APPENDIX A — OPINION OF THE SUPERIOR COURT OF PENNSYLVANIA (OCTOBER 19, 2000)

SUPERIOR COURT OF PENNSYLVANIA

JOSEPH P. GRIESSER,

Appellant,

v.

NATIONAL RAILROAD PASSENGER CORPORATION,

Appellee.

* * *

BEFORE: KELLY, JOYCE, and LALLY-GREEN, JJ.

LALLY-GREEN, J.:

¶ 1 Appellant, Joseph Griesser, appeals from the judgment entered October 26, 1999, following a jury trial. This case presents an issue of first impression in Pennsylvania regarding the interplay of the collateral source rule and the Federal Employers' Liability Act (FELA).[1] Appellant argues that the trial court erred by introducing evidence which is barred by the collateral source rule. We agree and, therefore, vacate the judgment.

¶ 2 The facts of the case are as follows. On February 7, 1994, Appellant sustained injuries in the course of his

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1. 45 U.S.C. §§ 51-60 (1908).

employment after falling backward onto the deck of a flatbed truck. On January 19, 1997, Appellant filed a FELA action against his employer, defendant/ appellee National Railroad Passenger Corporation (Amtrak). After a five-day trial in April 1998, a jury found Amtrak 50% negligent and Appellant 50% contributorily negligent. N.T., 4/14/98, at 4. The jury found that Appellant suffered a total of $419,500 in damages.[2] On October 26, 1999, the trial court entered judgment for Appellant in the amount of $209,750, reflecting Appellant's 50% contributory negligence. This appeal followed.

¶ 3 Appellant raises four issues on appeal:

> I. Whether the trial court, over vigorous objection of counsel, erroneously permitted defendant to repeatedly inject collateral source evidence into the proceedings?
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> II. Whether the trial court's negligence instruction, which erroneously engrafted common law concepts of proximate causation onto [FELA], prejudicially impacted the verdict?
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> III. Whether the trial court's contributory negligence instruction, which abrogated the railroad's burden of proof on this defense, erroneously sanctioned a diminution in plaintiff's

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2. The jury awarded $99,750 in past lost wages and benefits, $71,250 in future lost wages and benefits, $162,562 in past pain and suffering, and $85,938 in future pain and suffering. N.T., 4/14/98, at 4-5.

> damages under circumstances not warranted by federal decisional law?
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> IV. Whether the trial court, absent any affirmative showing of prejudice to the defendant, erroneously denied plaintiff's request to retain a substitute expert, and whether improvident comments from the bench and opposing counsel further exacerbated the resulting harm?

Appellant's Brief at 2. Because Appellant's first issue has merit, we need not address the remaining issues.

¶ 4 Appellant argues that the trial court committed reversible error by allowing the jury to hear evidence that Appellant could retire with full pension benefits at age 60. According to Appellant, this evidence violates the collateral source rule. Before discussing the applicable law, it is necessary to examine in detail the factual basis of Appellant's claim.

¶ 5 The record reveals the following. Appellant was age 45 at the time of trial. N.T., 4/7/98, at 74. Appellant presented an expert to testify as to future lost earning capacity. N.T., 4/8/98, at 66-93. This expert's calculations were based on an expected retirement age of either 65 or 70. *Id.* at 76-77; 79-80. On cross-examination, the expert was asked whether he was "aware that railroad employees who attain the age of 60 who have 30 years of experience are entitled to full retirement benefits." *Id.* at 82. Appellant's counsel objected, arguing that evidence of such benefits would violate the collateral source rule. *Id.* at 82-85. The court overruled the

objection on the ground that the evidence "does not introduce collateral source." *Id.* at 85. After the question was repeated, the expert answered, "No. I don't know the exact wording of it." *Id.* at 85. The expert did, however, volunteer that "the figures would be the same" if Appellant retired at age 60 with full benefits, because "earnings were provided through some other means." *Id.* at 86. After a sidebar, the trial court sustained an objection to further inquiry into this matter. *Id.* at 86-88.

¶ 6 On the next day, April 9, 1998, Amtrak began presenting its case in chief. Amtrak presented an expert forensic economist to testify as to Appellant's lost earnings. Over Appellant's counsel's objection, this expert testified in relevant part as follows:

> I measured — assuming [Appellant] would retire at 60, 62, and 66. Sixty is the age given [Appellant's] seniority he could have retired from the railroad and would have been eligible for full benefits. . . . [A]t age 62 if he were to retire then it turns out that given the pension benefits he would have been eligible for, he would be basically making as much after taxes from pension as he would from earnings.

N.T., 4/9/98, at 127.

¶ 7 Our standard of review is well settled. When reviewing a trial court's denial of a request for a new trial, "we must determine whether the trial court clearly and palpably abused its discretion or committed an error of law

which affected the outcome of the case." *Brinich v. Jencka,* 757 A.2d 388, 2000 PA Super 209 at ¶ 15 (citation omitted). "When improperly admitted testimony may have affected a verdict, the only correct remedy is the grant of a new trial." *Collins v. Cooper,* 746 A.2d 615, 620 (Pa.Super.2000) (citation omitted).

¶ 8 We now turn to the interplay between FELA and the collateral source rule. FELA is a federal statute which provides the framework for handling claims of injury by federal railroad workers. *Hileman v. Pittsburgh & Lake Erie R.R.,* 546 Pa. 433, 685 A.2d 994, 998 n. 1 (1996) (citation omitted). Unlike modern systems of workers' compensation, FELA requires a claimant to prevail in a negligence action against his employer in order to recover. *Id.* at 998 n. 1.

¶ 9 "[S]tate courts have jurisdiction to try FELA claims." *Id.* at 997, citing 45 U.S.C. § 56. State courts handling FELA claims are required to apply substantive federal law. *Id.* Under FELA, the collateral source rule is a "substantive precept of federal common law," and not a rule of evidence. *Id.* Accordingly, we review the trial court's decision for an error of law and not for an abuse of discretion. *Id.* ("balancing analysis," where court weighs probative value and prejudicial effect of collateral source evidence, is inappropriate under FELA).

¶ 10 Generally, "[t]he collateral source rule provides that payments from a collateral source shall not diminish the damages otherwise recoverable from the wrongdoer." *Johnson v. Beane,* 541 Pa. 449, 664 A.2d 96, 100 (1995). This rule "was intended to avoid precluding a claimant from

obtaining redress for his or her injury merely because coverage for the injury was provided by some collateral source, *e.g.* insurance." *Beechwoods Flying Service, Inc. v. Al Hamilton Contracting Corp.*, 504 Pa. 618, 476 A.2d 350, 352 (1984); *see also, id.* at 353 (the rule is "intended to prevent a wrongdoer from taking advantage of the fortuitous existence of a collateral remedy"); *Denardo v. Carneval*, 297 Pa.Super. 484, 444 A.2d 135, 140 (1982) ("Pennsylvania law is clear; the victim of a tort is entitled to the damages caused by the tortfeasor's negligence regardless of compensation the victim receives from other sources"), *citing, inter alia, Boudwin v. Yellow Cab Co.*, 410 Pa. 31, 188 A.2d 259 (1963).

¶ 11 The seminal case regarding the collateral source rule in the context of FELA is *Eichel v. New York Cent. R. Co.*, 375 U.S. 253, 84 S.Ct. 316, 11 L.Ed.2d 307 (1963) (per curiam). In that case, the plaintiff alleged that he sustained permanent, disabling injuries as a result of his employer's negligence. The employer attempted to introduce evidence that the plaintiff was receiving disability pension payments under the Railroad Retirement Act of 1937. *Id.* at 253, 84 S.Ct. 316. The employer explained that the evidence was probative of the plaintiff's motive for not returning to work. *Id.* at 254, 84 S.Ct. 316. The trial court excluded this evidence. *Id.* The Court of Appeals for the Second Circuit reversed, holding that the evidence should have been admitted. *Id.* The Supreme Court reversed and held that the evidence was properly excluded. *Id.*

¶ 12 The Supreme Court reasoned that the disability pension benefits could not be used to offset or mitigate the employer's damages. *Id.* The Supreme Court rejected the

argument that the evidence should have been admitted to show the plaintiff's motive for not returning to work:

> In our view the likelihood of misuse by the jury clearly outweighs the value of this evidence. Insofar as the evidence bears on the issue of malingering, there will generally be other evidence having more probative value and involving less likelihood of prejudice than the receipt of a disability pension. Moreover, it would violate the spirit of the federal statutes if the receipt of disability benefits under the [Railroad Retirement Act] were considered as evidence of malingering by an employee asserting a claim under the Federal Employers' Liability Act. We have recently had occasion to be reminded that evidence of collateral benefits is readily subject to misuse by a jury. *Tipton v. Socony Mobil Oil Co., Inc.*, 375 U.S. 34 [84 S.Ct. 1] [1963]. It has long been recognized that evidence showing that the defendant is insured creates a substantial likelihood of misuse. Similarly, we must recognize that the petitioner's receipt of collateral social insurance benefits involves a substantial likelihood of prejudicial impact. We hold therefore that the District Court properly excluded the evidence of disability payments.

Id. at 255, 84 S.Ct. 316 (footnotes omitted).[3]

3. *Tipton,* cited by *Eichel,* involved a claim under the Jones Act, 46 U.S.C. § 688. The Jones Act is analogous to FELA, but is (Cont'd)

¶ 13 *Eichel* involves "a straightforward application of the collateral source rule: a defendant may not introduce evidence that a plaintiff has received compensation on account of his injury from a source other than the defendant." *Hileman*, 685 A.2d at 997. This was so even though the plaintiff in *Eichel* was currently receiving disability benefits which were directly attributable to the injury at issue.

¶ 14 Federal and state courts have followed this straightforward application of *Eichel*. *See, e.g., Green v. Denver & Rio Grande Western R. Co.*, 59 F.3d 1029, 1032-1033 (10th Cir.1995), *cert. denied*, 516 U.S. 1009, 116

(Cont'd)
applicable to seamen. *Hileman*, 685 A.2d at 998 n. 1. The primary issue in *Tipton* was whether the plaintiff was a seaman for purposes of the Jones Act. The defendant attempted to show that the plaintiff was not a seaman by introducing evidence that the plaintiff had accepted compensation benefits through a different federal statute which is explicitly inapplicable to "a member of a crew of any vessel." *Tipton*, 375 U.S. at 35, 84 S.Ct. 1. The defense not only introduced the evidence, but repeatedly commented on that evidence. *Id.* at 35, 84 S.Ct. 1. The jury found that the plaintiff was not a seaman and, thus, did not address the issue of damages. *Id.*

The Supreme Court held that, "on the record in this case," the trial court committed reversible error. *Id.* Specifically, the trial court did not issue a limiting instruction informing the jury that the evidence was relevant only to the question of whether the plaintiff was a seaman. *Id.* at 35-36, 84 S.Ct. 1. Moreover, during deliberations, the jury asked the judge whether the plaintiff would have recourse to other benefits if he were not found to be a seaman. *Id.* at 36, 84 S.Ct. 1. Thus, it appeared from the record that the jury placed undue emphasis on the availability of collateral benefits. *Id.* at 37, 84 S.Ct. 1.

S.Ct. 565, 133 L.Ed.2d 490 (1995); *Wilcox v. Clinchfield R. Co.*, 747 F.2d 1059, 1060 (6th Cir.1984); *Morse v. Southern Pac. Transportation Co.*, 63 Cal.App.3d 128, 133-134, 133 Cal.Rptr. 577, 580-581 (1976). In *Green*, 59 F.3d at 1031, the trial court determined that Railroad Retirement Act disability benefits were admissible to offset any damage award that the plaintiff might receive. On appeal, the Tenth Circuit Court of Appeals held that introduction of such evidence was reversible error, even though the jury found no liability, because of the concern that "juries will be more likely to find no liability if they know that the plaintiff has received some compensation." *Id.* at 1033-1034.

¶ 15 The instant case presents a more attenuated link between the injury and the benefits at issue. The benefits at issue are future retirement pension benefits and not current disability benefits. Thus, the benefits are not related to the injury.

¶ 16 Appellant argues that because he is permanently disabled, he is entitled to lost wages until the usual age of retirement (either 65 or 70). Implicit in this argument is that, but for the injury, Appellant would have worked until age 65 or 70. Amtrak presented evidence that if Appellant had continued working at Amtrak until age 60, he would have been able to retire with benefits equivalent to a full salary. Thus, Appellant had an incentive to retire at age 60 even if he had not been injured. Consequently, Amtrak argues, the assumption that he would have worked until age 65 or 70 is faulty.

¶ 17 No Pennsylvania state case has decided whether evidence of benefits not related to the injury is barred by the collateral source rule. Indeed, *Hileman* is the only Pennsylvania state case discussing the interplay between FELA and the collateral source rule. In that case, our Supreme Court addressed a counterpart to the collateral source rule: namely whether the court commits reversible error when it permits plaintiff to argue that he has no recourse to workers' compensation because he is a federal railroad employee. *Hileman,* 685 A.2d at 997. Our Supreme Court held, as a matter of federal and state law, that the trial court did commit reversible error. *Id.* at 997-998 (reasoning in part that the evidence is irrelevant to the issues in the case and "can serve only to create sympathy for the plaintiff and potential prejudice against the defendant").

¶ 18 Courts from other jurisdictions, however, have held that such evidence is inadmissible. One case on point is *Lee v. Consolidated Rail Corp.,* 1995 U.S. Dist. Lexis 18199, 1995 WL 734108 (E.D.Pa. December 5, 1995). In that case, the plaintiff was injured in the course of his employment with Conrail. Conrail attempted to introduce evidence that under the Railroad Retirement Board's early retirement policy, the plaintiff would have been entitled to retire at age 62 with full benefits. *Id.* at *10, 1995 WL 734108 at *4. Conrail argued that the evidence was relevant to show that the plaintiff had an incentive to retire early, even if he had not been injured. Conrail further argued that: (1) evidence pertaining to a worker's incentive to retire early is always relevant to the issue of lost wages; and (2) the collateral source rule only bars evidence of benefits paid as a result of the injury, not evidence of benefits that would have been

paid notwithstanding his injury. *Id.* at **10-12, 1995 WL 734108 at *4.[4]

¶ 19 The *Lee* court rejected these arguments, reasoning that under *Eichel* and its progeny, evidence of collateral source benefits "must be categorically excluded." *Id.* at *11, 1995 WL 734108 at *4 (citations omitted). Moreover, "any evidence that demonstrates alternative sources of compensation is inadmissible when a jury may use it to offset the plaintiff's damages." *Id.* at **12-13, 1995 WL 734108 at *4, *citing Tipton, supra; Reed v. Philadelphia, Bethlehem & New England R. Co.*, 939 F.2d 128 (3rd Cir.1991); *Page v. St. Louis Southwestern Ry. Co.*, 349 F.2d 820 (5th Cir.1965); and *Brumley v. Federal Barge Lines, Inc.*, 78 Ill.App.3d 799, 33 Ill.Dec. 609, 396 N.E.2d 1333 (1979). We find *Page* and *Brumley* particularly instructive.

¶ 20 In *Page*, a FELA case, the defendant presented evidence that the injured plaintiff was currently receiving retirement benefits under the Railroad Retirement Act. *Page*, 349 F.2d at 821. While the plaintiff claimed that he was not working as a result of the injury, the defendant argued he was simply malingering and would have retired even though no injury had occurred. *Id.* at 820-821. Citing *Eichel* and *Tipton*, the Fifth Circuit Court of Appeals held that introducing such evidence was reversible error:

> [W]e think there is no substantial basis for distinguishing this case from *Eichel* and *Tipton* . . . . Both *Tipton* and *Eichel* reflect a strong policy

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4. Amtrak raises the same arguments in the instant case. Amtrak's Brief at 12-13.

> against the use of such collateral source evidence in FELA and analogous Jones Act-maritime law seamen's cases. With the whole result in our case being the enigma wrapped in the mystery of a general verdict concealing forevermore the use or uses to which the jury might have put this evidence, we cannot say that the error, preserved by emphatic and timely objection, was harmless.

Id. at 822 (footnote omitted).[5]

¶ 21 *Brumley* arose under the Jones Act. The plaintiff in that case was 63 years old on the date of trial. *Brumley,* 33 Ill.Dec. 609, 396 N.E.2d at 1335. The trial court had excluded all evidence regarding "pension, retirement, and social security benefits plaintiff was to receive upon retirement." *Id.* at 1339. The defendant had argued that such evidence was relevant to the plaintiff's future earning capacity, and probative of the plaintiff's motivation to continue working beyond age 65. *Id.* The Appellate Court of Illinois, citing *Eichel* and *Tipton,* held that the trial court committed no error:

> The same policy considerations that warrant the exclusion of disability benefits apply equally to the same controversy. The possibility of prejudice

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5. Unlike the *Page* jury, the jury in the instant case used a special verdict form. This distinction does not compel a different result, because it is still difficult if not impossible to tell how the jury used the improperly-admitted evidence. *See, Gallo v. Yamaha Motor Corp.,* 363 Pa.Super. 308, 526 A.2d 359, 366 (1987) (following this principle with respect to erroneous jury instructions), *appeal denied,* 517 Pa. 623, 538 A.2d 876 (1988).

> resulting from the admission of social security and retirement benefits is readily apparent. The jury could easily confuse the purpose for which such evidence was admitted. . . . Accordingly, the broadly based Federal policy expressed in *Eichel* and *Tipton* precluding the admission of collateral benefits in Jones Act and F.E.L.A. cases is controlling.

Id. at 1340.[6]

¶ 22 We find the reasoning of *Lee* and the cases cited therein to be persuasive.[7] *See also, Mahon v. Reading Co.,*

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6. We have already discussed *Tipton* in footnote 3, supra. *In Reed,* the plaintiff brought against his employer under Federal Safety Appliance Act, not FELA. *Reed,* 939 F.2d at 129. Plaintiff's counsel, in closing argument, contended that the defendant tried "to deprive him of every right that he has under the law." *Id.* at 133. In response, defense counsel contended that the plaintiff had not been "cast aside"; rather, he is currently collecting disability payments. *Id.* Moreover, defense counsel suggested that the plaintiff would have retired early if the injury had not occurred: "being on disability, he felt like a free man, that he didn't have to punch a time clock." *Id.* The third Circuit Court of Appeals held that it was reversible error to all the defense to make such comments. First, evidence of disability payments has been excluded by a motion in limine, and thus was not part of the record at trial. *Id.* Next, citing *Eichel* and *Tipton,* the court held that the defense's argument had a significant likelihood of prejudicing the jury. *Id.* at 133-134.

7. We recognize that decisions from federal district courts, federal circuit courts, and out-of-state courts are not binding on this Court, even in cases involving federal substantive law. *Willard v. Interpool, Ltd.,* 2000 PA Super 235 at ¶ 6, 758 A.2d 684.

367 F.2d 25, 30 (3rd Cir.1966) (noting in *dicta* that evidence of unemployment benefits was inadmissible for any purpose in a FELA case and observing that "any benefits paid by the Railroad Retirement Board . . . cannot be taken advantage of by defendant to mitigate the damage or otherwise"); *Kirnmen v. Conrail,* 1999 U.S. Dist. Lexis 2973, 1999 WL 148360 at *3 (E.D.Pa. March 17, 1999) at *9 (evidence of retirement pension benefits were properly excluded in a FELA case because the probative value thereof would be substantially outweighed by the danger of unfair prejudice); *Finley v. AMTRAK,* 1 F.Supp.2d 440, 443-444 (E.D.Pa.1998) (granting mistrial in a FELA case where defense counsel, in opening statement, repeatedly commented to jury that plaintiff had retired and was currently receiving a disability pension).

¶ 23 We understand that future retirement benefits are not triggered by the injury; rather, they would have been awarded even if Appellant had not been injured. Moreover, future retirement benefits do not improperly suggest that the plaintiff is currently being compensated for his injury from another source. In these respects, the evidence at issue is not "classic" collateral source evidence.

¶ 24 On the other hand, there remains a significant danger that a jury will misuse and misinterpret evidence of early retirement benefits. For example, the jury could conclude that Amtrak was liable for lost wages to age 65 or 70, but then decline to award such damages because of the fortuitous existence of equivalent retirement benefits. Or, the jury could conclude that Appellant was entitled to benefits only to age 60 and was attempting to seek a double recovery

of benefits after age 60. In short, this evidence distracts the jury from the issues in the case and has a strong likelihood of prejudicing the plaintiff. Thus, we conclude that evidence of Appellant's future retirement benefits was inadmissible to show that Appellant had an economic incentive to retire before age 65, because of the danger that the jury would use this evidence for the improper purpose of mitigating Appellant's damages or reducing Amtrak's liability. In this way, we adhere to the underlying purpose of the collateral source rule in light of the strong policy against the admission of collateral benefits in FELA cases.

¶ 25 Amtrak raises several alternative arguments for affirming the trial court's decision. First, Amtrak argues that evidence of future retirement benefits was admissible to impeach the credibility of Appellant's lost-wages expert. Specifically, the evidence was admissible to show that Appellant's expert did not know that railroad workers commonly retire at age 60 if they have 30 years of service. Amtrak's Brief at 10, 12-13.

¶ 26 Under the facts of this case, this argument is misplaced. Amtrak could have pursued this line of cross-examination without alluding to the fact of early retirement benefits. *Eichel,* 375 U.S. at 255, 84 S.Ct. 316. Moreover, Amtrak introduced evidence of retirement benefits not only through cross-examination, but also through Amtrak's own case-in-chief. As noted above, Amtrak's expert explicitly told the jury that Appellant could have retired at age 60 with full benefits. N.T., 4/9/98, at 127.

¶ 27 Second, Amtrak argues that Appellant "opened the door" by claiming that he would have retired at age 65 or 70; therefore, Amtrak was permitted to present rebuttal evidence that Appellant would have worked to age 60. Amtrak's Brief at 14. We agree that Amtrak should be able to present evidence tending to show that Appellant would not work beyond age 60; however, for the reasons set forth above, this evidence should not include the availability of early retirement benefits. *Eichel,* 375 U.S. at 255, 84 S.Ct. 316.

¶ 28 Finally, Amtrak argues that the trial court had the discretion to balance the probative value and prejudicial impact of the evidence; therefore, we should review the court's decision for an abuse of discretion. Amtrak's Brief at 15-17. One federal circuit court has come to this conclusion. *McGrath v. CONRAIL,* 136 F.3d 838, 841 (1st Cir.1998). Our Supreme Court, however, has rejected this position. *Hileman,* 685 A.2d at 997. Accordingly, we are not at liberty to come to a different result.

¶ 29 In conclusion, we hold that the trial court committed an error of law when it permitted Amtrak to present evidence of collateral early retirement benefits. Given the likelihood that the jury may have used this evidence to mitigate Appellant's damages or reduce Amtrak's liability, we are constrained to remand for a new trial on liability and damages.

¶ 30 Judgment vacated. Remanded for a new trial. Jurisdiction relinquished.

APPENDIX B — OPINION OF THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY (MARCH 27, 2000)

IN THE COURT OF COMMON PLEAS OF
PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

JANUARY TERM, 1997

No. 0649
Superior Ct # 02614EDA99

JOSEPH P. GRIESSER

Plaintiff

v.

NATIONAL RAILROAD PASSENGER
CORPORATION

Defendant

OPINION

INTRODUCTION

Joseph P. Griesser (hereinafter referred to as Plaintiff) filed this appeal before the Superior Court and argues that the verdict is against the weight of the evidence, and that this Court made erroneous evidentiary rulings; errors which entitle him to a new trial. This Court finds against Plaintiff on all issues.

Appendix B

PROCEDURAL HISTORY

On February 7, 1994, Plaintiff, while in the course of his employment, stepped in a hole on a flatbed truck, causing him to fall backwards onto the deck of the truck. On January 10, 1997, Plaintiff instituted an action under the Federal Employers' Liability Act, 45 U.S.C.A. § 51 ("FELA"), to recover damages for his injuries.

On December 31, 1997, National Railroad Passenger Corporation (hereinafter referred to as Defendant) filed several motions in limine seeking to preclude the admission of evidence, namely, certain expert reports submitted by Plaintiff after the deadline for the submission of such evidence had passed.

On January 23, 1998, Plaintiff petitioned the court for extraordinary relief, specifically to request a 30-day extension in which to obtain an orthopedic specialist. That petition was denied on February 12, 1998. (2/9/98 Order of Court)

Plaintiff subsequently filed a motion for reconsideration of the petition for extraordinary relief on February 27, 1998. On April 1, 1998, that motion was also denied. (3/26/98 Order of Court)

After these rulings, trial commenced on April 6, 1998, and on April 14, 1998 the jury rendered a verdict that attributed 50% of the causal negligence to the Defendant and attributed 50% of the causal negligence to the Plaintiff.

Appendix B

Dissatisfied with the verdict, on April 22, 1998, Plaintiff filed a post-trial motion requesting a new trial pursuant to the provisions of Pennsylvania Rule of Civil Procedure (Pa.R.C.P.) 227.1(A)(1), and argued that the jury's verdict was against the weight of the evidence and that this Court committed numerous errors in its evidentiary rulings. On February 16, 1999, this Court heard oral argument on Plaintiff's post-trial motion. Said motion was denied on August 10, 1999.

On August 20, 1999, Plaintiff filed this timely appeal.

ISSUES

In response to an order issued in accordance with Pennsylvania Rule of Appellate Procedure (Pa.R.A.P.) 1925(b), Plaintiff filed of record a concise statement of matters complained of on appeal, and argued similar issues to those presented in the post-trial motion, which included:

1. Whether this Court erroneously permitted Defendant to introduce evidence of Plaintiff's entitlement to collateral source benefits in direct contravention of the clear proscriptions of the United States Supreme Court, as well as the courts of this Circuit and Commonwealth.

2. Whether this Court's jury charge erroneously engrafted common law standards of proximate and direct causation onto the Federal Employers' Liability Act, 45 U.S.C.A. § 51, ("FELA"), which merely requires, to establish

liability, a finding that a defendant's acts and/or omissions played any part, even the slightest, in producing a plaintiff's injuries.

3. Whether the Court's "choice of ways" charge erroneously permitted a jury finding of contributory negligence irrespective of any requirement that Plaintiff knew or should have known that the manner in which he chose to perform his job was unreasonable or that a safer alternative means to accomplish his assigned duties was available.

4. Whether this Court's contributory negligence charge erroneously permitted the jury to diminish Plaintiff's damages based solely upon a finding that he had assumed the risk of employment, an affirmative defense unavailable under the FELA.

5. Whether this Court erroneously failed to charge the jury on the distinction between the doctrines of contributory negligence and assumption of the risk despite the fact that the evidence adduced at trial presented a clear danger that the jury might impermissibly reduce plaintiff's recovery based solely upon the latter defense.

6. Whether this Court's charge erroneously failed to affirmatively instruct the jury that a FELA defendant, as a matter of law, had a

continuing, non-delegable duty to provide its employees with a reasonably safe place to work.

7. Whether this Court proffered an unqualified charge on Plaintiff's duty of care which improperly sanctioned a finding of contributory negligence based upon facts which would not warrant any diminution of damages.

8. Whether this Court's comparative negligence charge erroneously sanctioned the diminution of Plaintiff's damages absent any correlative finding that his conduct was a causative factor in producing his injuries.

9. Whether this Court's "sole cause" charge was not supported by the evidence.

10. Whether this Court's mitigation charge was not supported by the evidence and, as required, failed to instruct the jury that the railroad had the burden of proof to establish this affirmative defense.

11. Whether this Court erroneously refused to permit Plaintiff to retain a substitute medical expert, even though: (1) no prejudice or surprise would have inured to the Defendant; (2) there would have been no disruption of the orderly and efficient trial of the case or

other matters before this Court; and (3) there was no showing of bad faith or willfulness on the part of Plaintiff's counsel.

12. Whether this Court erroneously permitted defense counsel to elicit from its medical expert the extra judicial opinions of a non-testifying physician upon whose findings the witness did not rely.

13. Whether this Court erroneously permitted defense counsel to comment on the medical findings of a non-testifying expert, thereby prejudicially allowing closing argument on facts not in evidence.

14. Whether this Court made prejudicial comments during the proceedings which invaded the sole province of the jury to gauge Plaintiffs credibility and assess the extent of his injuries.

STATEMENT OF FACTS

Briefly, the following are the relevant facts supported by the record and which were reasonably considered by the jury in rendering its verdict:

Plaintiff worked for Defendant for 17 years. On February 7, 1994, at approximately 7:00 a.m., Plaintiff, while working for Defendant as a maintainer in Defendant's Signal Department (at the 32nd Street Shop located in Philadelphia,

Pennsylvania), was instructed to go to Defendant's Penn Coach Yard with a co-worker to pick up an air compressor and transport that compressor to a construction site in North Philadelphia. During this unloading Plaintiff was positioned in the back of the flatbed truck used to transport the compressor. When Plaintiff attempted to undo the compressor, his momentum carried him back, causing his left foot to become caught in a hole in the bed of the truck. Although Plaintiff had frequently used this specific flatbed truck and was aware of the presence of the very hole in which he fell, Plaintiff nevertheless fell backwards onto the deck of the truck as a result of the hole. (N.T. 4/6/98 at 32; N.T. 4/7/98 at 82-83; N.T. 4/8/98 at 13, 17, 21-22).

On January 19, 1997, almost three years after his accident, Plaintiff filed a complaint alleging he sustained serious and permanent injuries stemming from his fall.

However, immediately following his accident, Plaintiff did not go to the hospital despite the fact that his supervisor asked him if he wanted to do so. (N.T. 4/8/98 at 36). Plaintiff even went into work the very next day following his fall (*Id.*) Once again, Plaintiff declined another request from his supervisor that he go to the hospital. (*Id.* at 37). In fact, Plaintiff did not go to the hospital until he was prompted to do so by a "boss" at his employment later that day. (*Id.* at 38).

As a result of his injuries, Plaintiff did not work from February 8, 1994 until June 22, 1994. (N.T. 4/7/98 at 93). However, following this brief hiatus, Plaintiff returned to work until September 11, 1994. (*Id.* at 100). Although Plaintiff's employment was again interrupted from September

11, 1994 until October 1, 1995, Plaintiff again resumed his employment from October 1995 until July 1996. (*Id.* at 101).

Plaintiff also had prior medical conditions that predated his accident. In 1991, Plaintiff sought treatment for an injury to his right and left shoulders which was caused by moderate to severe trapezius spasm in the left shoulder as well as a minor degree of spasm in the right shoulder. (N.T. 4/8/98 at 4, 6). Later that year, Plaintiff visited a hand surgeon because of numbness in his left hand over the thumb and index finger. (*Id.* at 9). Then in 1992, Plaintiff started to have problems with his left shoulder again. Plaintiff was diagnosed as having Thoracic Outlet Syndrome in March 1992, and, as a result, had an operation. (*Id.* at 9-10).

Plaintiff specifically injured or strained his lower back on various occasions prior to his fall on the flatbed truck as well. Plaintiff recalls back pain predating his accident that was attributable to his daily employment. (*Id.* at 11.) Plaintiff specifically remembers wrenching his back when he picked something up with his partner. (*Id.*) However, Plaintiff also experienced back problems that were not suffered while he was at work. Plaintiff complained of pain in the right side of his back to Dr. Hart on January 8, 1991, and was subsequently treated for such. (*Id.* at 12). Plaintiff admits that he was not on the job when he began to experience this pain. (*Id.*)

In addition, when Plaintiff visited Dr. Koorvar, a pain specialist, on May 3, 1994, just several months after his accident, Plaintiff filled out a form in which he answered that the location of pain was in his "upper back," while

making no mention of any pain in his lower back (*Id.* at 43). Moreover, Plaintiff also drew a circle indicating that the correlation of his pain was in his upper back, and not in his lower back. (*Id.* at 44).

Furthermore, Plaintiff failed to produce any medical expert testimony establishing a causal connection between Plaintiff's accident and Plaintiff's lower back injuries. In fact, one doctor from which Plaintiff sought treatment noted in his April 10, 1996 report regarding Plaintiff's condition that Plaintiff's chronic pain syndrome is of "unknown origin." (Exhibit C from Defendant's 3/16/98 Motion in Limine) In addition, while being examined by Defendant's medical expert, Dr. Osterholm, Plaintiff advised Dr. Osterholm that the doctors Plaintiff was treating with informed him that he was suffering from a nerve root irritation and nerve problems in his back "due to damage with unknown causation." (Exhibit D at 7 from Defendant's 3/16/98 Motion in Limine).

Moreover, Dr. Osterholm conveyed that Plaintiff's damages "is certainly not one associating with an injury of the type this patient describes." (*Id.* at 9) Rather, Dr. Osterholm's report documents that "it is more likely to be due to a medical cause of some disease process which is . . . not associated with an injury." (*Id.*)

LAW AND DISCUSSION

As stated, Plaintiff contends that the jury's verdict is against the weight of the evidence, and that this Court erred in numerous evidentiary rulings so as to entitle him to a new trial.

Appendix B

Issue I

Plaintiff's first contention is that this Court erroneously permitted Defendant to introduce evidence of Plaintiff's entitlement to collateral source benefits in direct contravention of the clear proscriptions of the United States Supreme Court, as well as the courts of this Circuit and Commonwealth.

While it is apparent that federal substantive law requires the exclusion of evidence regarding collateral source benefits in FELA cases,[1] it is equally evident that this Court astutely followed these clear proscriptions, for no evidence whatsoever concerning collateral source benefits was ever introduced at trial. Contrary to Plaintiff's assertions, the narrow issue of retirement was only admitted for the sole purpose of impeaching Plaintiff's economic expert witness as to the accuracy of that witness' calculations regarding Plaintiff's future lost earnings and work expectancy, for it was Plaintiff's witness that first introduced evidence on direct examination concerning the issue of retirement. (N.T. 4/8/98 at 70, 75-81, 83). While attempting to explain work life expectancy to the jury, Plaintiffs expert stated that the most generally accepted age used to calculate the potential number of years a person could be working was 65 and 70. (*Id.* at 75). Consequently, Plaintiff's expert was basing all of his calculations on Plaintiff's future lost earnings on the fact that Plaintiff would retire at age 65 or 70. (*Id.* at 77-81).

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1. Defendants in FELA cases are not permitted to inform the jury that a plaintiff has received benefits from a source other than the defendant. *Hileman v. Pittsburgh & Lake Erie R.R. Co.*, 546 Pa. 433, 437, 685 A.2d 994, 997 (Pa. 1996).

However, railroad employees who attain the age of 60 who have 30 years experience are entitled to full retirement benefits. (*Id.* at 85). Therefore, since Plaintiff began his employment with Defendant in May 1977, Plaintiff would have been entitled to full retirement benefits when he was 60. Defendant's cross examination was limited to that narrow issue so as to simply clarify when Plaintiff could have retired with full benefits.

Furthermore, this Court, cognizant that evidence of a plaintiff's collateral benefits must be excluded under the FELA statute, was extremely cautious to bar Defendant from introducing such inadmissable evidence, and even went so far as to articulate such concern when it perceived that Defendant may try to introduce any kind of evidence relating to Plaintiff's collateral source benefits. (N.T. 4/8/98 at 86-87) Therefore, evidence of collateral source benefits that Plaintiff may have been entitled to was never admitted into evidence.

Issue II

Plaintiff also asserts that this Court's negligence instruction erroneously engrafted common law standards of proximate and direct causation onto the FELA.

Although it is well established that under the FELA an employee is entitled to recovery if the employer's negligence played any part in producing the employee's injury, this feather-weight standard does not somehow reduce plaintiff's burden of proof, for the plaintiff must still prove ordinary negligence. *Smith v. Conrail*, 15 Phila. 371 (Pa. C.P. 1987). The law announced by the Supreme Court only states that once negligence is proven, then the plaintiff is entitled to

full recovery even though the negligence of the defendant may have played only the slightest part in producing the ultimate injuries. *Id.* If there is no negligence, there is no recovery, for liability under the FELA must be based on a showing of negligence and not on the mere fact that an employee was injured while on the job. *Hileman v. Pittsburgh & Lake Erie R.R. Co.*, 546 Pa. 433, 436, 685 A.2d 994, 996 (Pa. 1996). Hence, any injury or damage resulting in whole or in part from the employer's negligence requires a jury finding of causal relationship. *Hausrath v. New York Central R.R. Co.*, 401 F.2d 634, 637 (6th Cir. 1968). Consequently, an employer's liability under FELA is to be determined under the general rule which defines negligence. *Lehman v. National R.R. Passenger Corp.*, 443 Pa. Super. 185, 189, 661 A.2d 17, 19 (1996). Therefore, "the FELA in no way reduces plaintiff's initial burden of proving negligence itself." *Smith v. Conrail*, 15 Phila. 371 (Pa. C.P. 1987).

Accordingly, in drafting its jury instruction regarding negligence, it is evident that this Court merely observed and obeyed these authoritative legal principles concerning FELA. Although there is only a feather-weight standard of negligence under the FELA, there must nevertheless be legal, proximate cause in order to substantiate a claim of negligence under the FELA. Consequently, this Court, conscious of such legal authority, wanted to ensure that the jury determined that Defendant's negligence was the legal and proximate cause of Plaintiff's injuries. As a result, the term "substantial" in the negligence instruction was intended to modify only the proximate cause aspect of the negligence standard and was never intended to imply that the negligence itself must be substantial in order for Plaintiff to recover under the FELA.

Furthermore, the jury found that Defendant was negligent. Therefore, the jury concluded that Plaintiff met this feather-weight standard of FELA as well as the higher standard of general negligence. Consequently, even if this Court's negligence charge was erroneous, such error did not harm plaintiff, and was therefore harmless error.

Issue III

Plaintiff next claims that this Court's jury instructions erroneously permitted ~~a jury~~ finding of contributory negligence and that the jury's subsequent diminution of Plaintiff's damages based on this finding of contributory negligence was erroneously permitted by this Court as well.

Under FELA, contributory negligence is a defense. *Dale v. Baltimore & Ohio R.R. Co.*, 520 Pa. 96, 113, 552 A.2d 1037, 1045 (Pa. 1989). Contributory negligence is a careless act or omission on the plaintiff's part tending to add new dangers to conditions that the employer negligently created or permitted to exist. *Paul v. Missouri Pac. R.R. Co.*, 963 F.2d 1058, 1060 (8th Cir. 1992). Furthermore, contributory negligence includes failure to use ordinary care under existing circumstances for one's own safety, such as failure to use due care when encountering a hazard. *Sauer v. Burlington Northern R.R. Co.*, 106 F.3d 1490, 1496 (10th Cir. 1996). Contributory negligence even encompasses "a careless act or omission on the plaintiff's part tending to add new dangers to conditions that the employer negligently created or permitted to exist." *Paul v. Missouri Pac. R.R. Co.*, 963 F.2d 1058, 1060 (8th Cir. 1992).

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In addition, it is well settled that where a person has a choice of two ways, one of which is perfectly safe and the other subject to obvious risks, and voluntarily chooses the latter and is injured, he is guilty of contributory negligence. *Mattox v. City of Philadelphia*, 308 Pa. Super. 111, 117, 454 A.2d 46, 49 (1982). This "choice of paths" rule applies if two distinct ways exist, one of which is clearly recognizable as safe and the other as involving danger, and if the plaintiff has the freedom to choose between them. *Oswald v. Stewart*, 301 Pa. Super. 463, 470, 448 A.2d 1, 4 (1982). Basically the question is whether the path chosen was an obviously dangerous one, and whether a reasonably prudent person would not have followed the path chosen by the plaintiff. *Id.*

Given the facts of this case, the "choice of paths" instruction was appropriate, for Plaintiff clearly chose to perform his job in a dangerous manner despite the fact that a safer alternative was obviously available. Plaintiff was aware this flatbed truck had this existing hole in it because he had used that particular truck about 15 times that year. (N.T. 4/8/98 at 17). On the day he suffered his injury, Plaintiff was to load a compressor onto the flatbed truck, and had to therefore climb up one side of the flatbed in order to perform this task. (*Id.* at 17-18). However, despite the fact that he knew the hole in the flatbed existed and knew the precise location of this dangerous condition, Plaintiff nevertheless decided to unload the compressor from the side of the flatbed where the hole was located instead of climbing up on the other side, where no dangerous condition existed, to accomplish the job. (*Id.* at 21). Even though he had the option of climbing up either side in order to unload the compressor,

Plaintiff nevertheless chose the one that involved a dangerous condition. (*Id.* at 21-22). Therefore, Plaintiff elected to encounter an obviously dangerous path despite the fact that a safer alternative was available. Accordingly, the facts of this case warrant the "choice of paths" language to be contained in the contributory negligence instruction.

Additionally, such facts also permit a jury to find that Plaintiff was contributorily negligent under FELA. However, Plaintiff asserts that this Court's contributory negligence charge contained principles derived from the assumption of risk doctrine, a defense which is unavailable in FELA cases. *Fausher v. New Jersey Transit Rail Opers.*, 57 F.3d 1269, 1273 (3rd Cir. 1995). Assumption of risk is an employee's voluntary, knowledgeable acceptance of a dangerous condition that is necessary for him to perform his duties. *Birchem v. Burlington Northern R.R. Co.*, 812 F.2d 1047, 1049 (8th Cir. 1987).

While assumption of risk is not a defense under FELA, the facts of this case do not suggest that the jury's determination of Plaintiff's contributory negligence was rooted in assumption of risk tenets. In order for Plaintiff to assume the risk, his voluntary acceptance of the dangerous condition must be necessary for him to perform his duties. Such is not the case in this matter. Clearly, Plaintiff's decision to perform his job from the side on which he knew the hole was located illustrates that he was negligent in not choosing the safer route. It is mere sophistry for Plaintiff to argue that he "had" to accept the condition, for the very existence of the safer route nullifies per se the assumption of risk argument. Accordingly, from a legal standpoint it is

apparent that Plaintiff could never have assumed the risk of unloading the compressor from the side of the flatbed that contained the hole because it was not necessary to the performance of his duties.

Another issue raised by Plaintiff on appeal is that this Court erroneously failed to charge the jury on the distinction between the doctrines of contributory negligence and assumption of the risk despite the fact that the evidence adduced at trial presented a clear danger that the jury might impermissibly reduce plaintiff's recovery based solely upon the latter defense. However, Plaintiff attempted to inject assumption of the risk language into this Court's charge in an effort to deceive or confuse the jury. (N.T. 4/13/98 at 20) Nevertheless, as this Court explained, it is not legally possible, given the facts of this case, for Plaintiff to have assumed the risk that ultimately caused his injuries. Furthermore, this Court did not want to even "inject the assumption of risk issue where it was not warranted," for fear that "it would confuse the jury on this point." (N.T. 4/13/98 at 20).

Issue IV

Plaintiff further alleges that this Court's charge erroneously failed to affirmatively instruct the jury that a FELA defendant, as a matter of law, had a continuing, non-delegable duty to provide its employees with a reasonably safe place to work.

It is well established that a trial court has wide discretion in phrasing jury instructions. *Commonwealth v. Hawkins*,

549 Pa. 52, 701 A.2d 492, 511 (Pa. 1997). Furthermore, the charge must be considered as a whole to determine whether the trial court clearly and accurately presented the concepts of the legal issue to the jury. *Commonwealth v. Ragan*, 743 A.2d 390 (Pa. 1999).

The jury instruction given by this Court, regarding Defendant's duty to Plaintiff, consisted of the following:

> In order to find Defendant negligent, you must find the Defendant owed a duty to his employee to provide a safe workplace and safe equipment and that the employer breached that duty.
>
> Amtrak's duty to its employees is to use reasonable care in providing a workplace and equipment that is reasonably suitable and safe for the purpose and in the circumstances in which they are to be used. The test is not whether the equipment to be used and the place in which work is to be performed are absolutely safe, nor whether the employer knew the same to be unsafe, but whether the employer has exercised reasonable care and diligence to make them safe.

Although the intent of the FELA may be to provide liberal recovery for injured workers, according to the law, that recovery must be based on a finding of employer negligence. *Hileman v. Pittsburgh and Lake Erie RR Co.*, 546 Pa. 433, 442, 685 A.2d 994, 998 (Pa. 1996). The scope of the employer's duty, the degree of the employer's negligence, and other elements may be defined to ease the

plaintiff's burden, but the trial of the issues cannot be skewed in favor of either party. *Id.*

While Plaintiff may desire a skewed charge in his favor, this Court's jury instruction, viewed in its entirety, regarding Defendant's duty to Plaintiff is a true and correct charge, for this Court clearly and accurately presented the duty issue to the jury.

Issue V

Another claim raised by Plaintiff is that this Court proffered an unqualified charge on Plaintiff's duty of care which improperly sanctioned a finding of contributory negligence based upon facts which would not warrant any diminution of damages.

As mentioned earlier, contributory negligence is a viable defense under FELA. *Dale v. Baltimore & Ohio R.R. Co.*, 520 Pa. 96, 113, 552 A.2d 1037, 1045 (Pa. 1989). The Defendant raised the contributory negligence issue in the present case and presented competent evidence to the jury. This Court instructed the jury as to the relevant law concerning Plaintiff's duty of care regarding contributory negligence in fair and impartial language which fairly put the issue to the jury.

Issue VI

Plaintiff also contends that this Court's comparative negligence charge erroneously sanctioned the diminution of Plaintiff's damages absent any correlative finding that his

conduct was a causative factor in producing his injuries, and that this Court failed to instruct the jury that Defendant had the burden of proof to establish this affirmative defense.

However, Plaintiff need look no further than the express language of the jury instructions he claims to be erroneous to recognize the inaccuracies of his argument. The jury instruction reads, in pertinent part:

> It is Defendant's burden to prove by a preponderance of the evidence that Plaintiff failed in his duty to himself. If you believe that Defendant has proven this by a preponderance of the evidence, then you must find Plaintiff negligent. You must next find that Plaintiff's negligence was a substantial contributory factor in bringing about his own injuries.
>
> As I instructed you a moment ago, a substantial contributory factor is an actual real factor. It is not an imaginary, hypothetical or irrelevant factor having little or no connection with the harm suffered. It is a cause which, in a continuous and unbroken sequence produces harm that would have not occurred without it. This is legal cause.
>
> Defendant has raised this issue by claiming that Plaintiff's negligence was the legal cause of his injury. Defendant has the burden of proving this by a preponderance of the evidence.

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If you find that only Defendant was negligent and that such negligence was a substantial contributing factor, then you must find for Plaintiff.

If you find that only Plaintiff was negligent and that such negligence was a substantial contributing factor, then you must find for Defendant.

If you find that both were negligent, then you must find what percentage each was negligent. The combined percentages must equal 100%. Whatever % you find Plaintiff to be negligent, will reduce his award, if any, by the same %.

It is evident that these instructions clearly and accurately conveyed that for Plaintiff's contributory negligence to be established, not only must Plaintiff's conduct have been a causative factor in producing his injuries, but that Plaintiff's negligence must also be a substantial contributory factor in bringing about his own injuries. In doing so, this Court went to lengths further than those Plaintiff now proposes.

Furthermore, Plaintiff's additional contention that this Court failed to instruct the jury that Defendant had the burden of proof to establish contributory negligence is equally specious. This Court expressly stated not only that Defendant had the burden of proof to establish this affirmative defense, but twice went on to communicate what that accompanying burden was.

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Issue VII

Another allegation asserted by Plaintiff is that this Court's "sole cause" charge was not supported by the evidence. That portion of the jury instruction read:

> If you find that only Defendant was negligent and that such negligence was a substantial contributing factor, then you must find for Plaintiff.
>
> If you find that only Plaintiff was negligent and that such negligence was a substantial contributing factor, then you must find for Defendant.

The jury, as the sole fact-finder, was free to apply the law to the facts as it found them in this case. Consequently, the jury was properly instructed regarding Defendant's negligence as well as Plaintiff's contributory negligence. Moreover, Plaintiff's contention that this instruction was not supported by the evidence is immaterial, for the jury ultimately found that neither the conduct of Plaintiff nor Defendant was the sole cause of Plaintiff's injuries.

Issue VIII

Plaintiff additionally claim that this Court erroneously refused to permit Plaintiff to retain a substitute medical expert, even though: (1) no prejudice or surprise would have inured to the Defendant; (2) there would have been no disruption of the orderly and efficient trial of the case or other matters before this Court; and (3) there was no showing of bad faith or willfulness on the part of Plaintiff's counsel.

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It is well established that the admission or exclusion of expert testimony is a matter within the sound discretion of the trial court. *Aiello v. Southeastern Pennsylvania Transportation Authority*, 687 A.2d 399, 402 (Pa. Commw. 1996). Furthermore, the imposition of sanctions such as excluding the use of expert witness testimony for failure to comply with a rule of discovery is largely within the discretion of the trial court. *Green Construction Co. v. Department of Transportation*, 643 A.2d 1129, 1139 (Pa. Commw. 1994). In determining whether to allow the testimony of a witness of which opposing counsel was unaware, the court must balance the facts and circumstances of each case to determine the prejudice to each party. *Feingold v. Southeastern Pennsylvania Transportation Authority*, 339 Pa. Super. 15, 21, 488 A.2d 284, 288 (Pa. Super. 1985). Such factors to consider include: (1) the prejudice or surprise in fact of the party against whom the excluded witnesses would have testified, (2) the ability of that party to cure the prejudice, (3) the extent to which waiver of the rule against calling unlisted witnesses would disrupt the orderly and efficient trial of the case or of other cases in the court, and (4) bad faith or willfulness in failing to comply with the court's order. *Id.*

On April 23, 1997, pursuant to the Day Forward Program, the Case Management Conference for this matter was held at which time several deadlines were set, including Plaintiff's expert report deadline of December 1, 1997. (Case Management Order) (Exhibit B from Defendant's 3/16/98 Motion in Limine) Plaintiff then petitioned the court for extraordinary relief on January 23, 1998, specifically to request a 30-day extension in which to obtain an orthopedic specialist. That petition was subsequently denied on February 12, 1998.

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However, Plaintiff maintains that the need for another orthopedic specialist to testify arose when Dr. Schwartzman, the orthopedic specialist treating Plaintiff, informed Plaintiff that he would be unavailable to testify. Plaintiff claims that he was unaware of Dr. Schwartman's unavailability prior to the December 1, 1997 deadline despite the fact that Plaintiff had more than seven months to verify whether his own expert witness would be available to testify. Accordingly, Plaintiff's lack of diligence did not provide justification for allowing Plaintiff to avail himself of the opportunity to retain an additional expert well after the mandated deadline specified in the Case Management Order.

In addition, precluding Plaintiff from substituting a supplemental expert witness that as an orthopedic specialist for Dr. Schwartzman was not prejudicial to Plaintiff, for it is apparent that Plaintiff has various options at his disposal. Of the 27 medical witnesses listed to testify on Plaintiff's behalf, such experts included other neurologic and orthopedic specialists. Therefore, Dr. Schwartzman was not Plaintiff's sole orthopedic specialist witness and Plaintiff could readily elicit testimony regarding that area of Dr. Schwartzman's expertise from another witness at Plaintiff's disposal. Furthermore, Dr. Schwartzman's unavailability was not related to any physical condition, conflict of interest, or any other valid reason. Consequently, Plaintiff could have simply subpoenaed Dr. Schwartzman to testify at trial. Therefore, Dr. Schwartzman's unavailability is as attributable to Plaintiff as it is to Dr. Schwartzman himself.

Moreover, while precluding Plaintiff from securing an additional medical expert was not prejudicial to Plaintiff, to

allow Plaintiff to do so would have been extremely prejudicial to Defendant. Throughout the discovery process and litigation Defendant often claimed that Plaintiff did not sufficiently satisfy the issue of causation, for Plaintiff never obtained a medical expert that concluded that Plaintiff's lower back injuries were caused by Plaintiff's accident. Therefore, to allow Plaintiff to obtain a new medical expert who may, for the first time, render an opinion regarding causation would have resulted in extreme prejudice to Defendant which could not be cured.

Issue IX

Plaintiff further declares that this Court erroneously permitted defense counsel to elicit extrajudicial opinions from his medical expert, thereby allowing defense counsel to comment on facts not in evidence.

While it is true that an expert may not state a conclusion which is based on evidence not in the record, it is also apparent that there is an exception to this general rule. *Commonwealth v. Thomas*, 444 Pa. 436, 445, 282 A.2d 693, 698 (Pa. 1971). The law in Pennsylvania is well-settled that a medical expert may express opinion testimony on medical matters based, in part, upon reports of others which are not in evidence, but which the expert customarily relies upon in the practice of his profession. *Allen v. Kaplan*, 439 Pa. Super. 263, 653 A.2d 1249, 1251 (Pa. Super. 1995).

Defendant's medical expert, Dr. Jewell Osterholm, testified that he customarily relies on the medical opinions of other doctors found in a patient's medical records when

formulating his medical opinion about that patient. (N.T. 4/9/98 at 20-21) Furthermore, Dr. Osterholm's reliance on the medical opinions of others is often quite significant. He testified that a patient's medical "history is extremely important" and that "90 percent (of the medical conclusion) is made on that basis." (N.T. 4/9/98 at 21). Accordingly, Dr. Osterholm reviewed the medical opinions of numerous doctors, including Dr. Barolet, regarding Plaintiff. However, in rendering his expert medical opinion, Dr. Osterholm did not act "as a mere conduit or transmitter of the content of an extrajudicial source," as Plaintiff alleges. (Appellant's Post-Trial Brief at 87). In addition to analyzing Plaintiff's lengthy medical records, Dr. Osterholm also conducted his own extensive examination of Plaintiff on November 12, 1997. (N.T. 4/9/98 at 37-42). And it was only after this examination that Dr. Osterholm formulated his own medical opinions about Plaintiff's injuries and the origin of those injuries. Consequently, the testimony given by Defendant's medical expert, Dr. Jewell Osterholm, regarding the medical opinions of a non-testifying neurosurgeon, Dr. Barolet, who previously examined Plaintiff, was well within the scope of the exception carved out for medical experts.

Issue X

Plaintiff's final argument is that this Court made prejudicial comments during the proceedings which invaded the sole province of the jury to gauge Plaintiff's credibility and assess the extent of his injuries.

While cross examining an expert witness for Defendant, Plaintiff's counsel, in an attempt to hoodwink the jury, stated

that Plaintiff "can't even stand up." (N.T. 4/9/98 at 114). This Court instructed the jury to disregard the question that contained that remark because "Mr. Griesser (has been) standing all day, as I observe." (indicating that Plaintiff had been standing in the rear of the courtroom, out of sight of the jury) (*Id.* at 115)

BY THE COURT

3-27-00
DATE

s/ Allan L. Tereshko
ALLAN L. TERESHKO, J.

APPENDIX C — PER CURIAM ORDER OF THE SUPREME COURT OF PENNSYLVANIA (APRIL 26, 2001)

IN THE SUPREME COURT OF PENNSYLVANIA EASTERN DISTRICT

No. 730 EAL 2000

JOSEPH P. GRIESSER,

Respondent

v.

NATIONAL RAILROAD PASSENGER CORPORATION,

Petitioner

PER CURIAM:

AND NOW, this 26th day of April 2001, the petition for allowance of appeal is denied.